

British Columbia Moves towards a Liability-Based Regulatory Regime for Oil and Gas to Address Orphan Sites

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The government of British Columbia recently introduced legislation aimed at strengthening the province's orphan well and liability management regime. Currently at the first reading at the province's Legislative Assembly, *the Energy, Mines and Petroleum Resources Statutes Amendment Act, 2018 (Bill 15)*, would amend the *Oil and Gas Activities Act (OGAA)* and the *Petroleum and Natural Gas Act*. The amendments aim to create a stricter liability management regime to combat the ballooning number of oil and gas sites in B.C., with insolvent operators. Since the beginning of the 2016/17 fiscal year, the B.C. Oil and Gas Commission (**Commission**) reported that the province has gone from 45 to 307 designated orphan sites due to such insolvencies.¹

Foremost among Bill 15's proposed amendments is the replacement, by levy, of the current orphan site reclamation fund tax paid by permit holders under the *OGAA*. The levy would become the primary payment by permit holders into B.C.'s Orphan Site Reclamation Fund (**OSRF**) — an industry-funded program that addresses the cost of abandonment, reclamation and environmental clean-up. The levy formula would be based on forecasted orphan site treatment and closure costs, set annually, with possible adjustments throughout the year as deemed necessary by the Commission. The calculation of each permit holder's levy will be determined by dividing the permit holder's liability by the total amount of liabilities of all permit holders required to pay the levy.²

This change from a tax to levy is likely to increase front-end financial obligations on operators and permit holders. Under the current fixed-tax regime, for example, producers make monthly payments of \$0.03 per 1,000 cubic metres of marketable gas produced and \$0.06 per cubic meter of petroleum produced.³ In substituting for a liability-based regime, the Commission will determine the total levies that permit holders will pay into the OSRF based on their current abandonment and reclamation liabilities rather than future production.

Enhanced Commission Authority

Bill 15 would also award additional powers to the Commission including further discretion in awarding permits and monitoring existing permit holders. The Commission will have an expanded range of factors to consider when deciding to issue, suspend, cancel or amend a permit. For example, even the conduct of the the permit holder's "associates", including agents, directors, officers or shareholders of the permit holder or any person who may have influence over the permit holder or affect the activities permitted by the permit, could potentially be part of the Commission's deliberations.

¹ British Columbia Oil and Gas Commission, "Commission Developing Comprehensive Liability Management Plan", (Victoria: BCO&GC April 2018) at page 3. online: <<https://www.bcogc.ca/publications/industry-bulletins>>.

² "Liabilities" are defined in Bill 15 as the Commission's estimate of the total cost to fully restore and reclaim a site, which would apply for each of a company's wells, facilities and pipelines.

³ "Orphan Site Reclamation Fund Tax - Province of British Columbia", (2018), online: *Www2govbcc* <<https://www2.gov.bc.ca/gov/content/taxes/natural-resource-taxes/oil-natural-gas/orphan-site-tax>>.

Bill 15 also proposes amendments to ease permit transfer requirements. In all situations, the current regime requires the permit holder's signature in order to transfer a permit. By contrast, Bill 15 proposes granting the Commission the discretion to approve a permit transfer to an interested person or company in the event that the existing permit holder is insolvent, no longer exists or otherwise cannot be located. This could allow operations to continue on sites that would have otherwise been declared orphaned.

Bill 15 additionally proposes granting the Commission enhanced flexibility to create regulations classifying certain long-term inactive oil and gas sites as dormant sites. The Bill also provides that, following a period of time determined by regulation, a permit for a dormant site will automatically be cancelled, thereby initiating restoration requirements. Permit holders facing this risk however will have the ability to submit a liability reduction plan to the Commission. If approved, the permit for an operator's dormant site will not automatically be cancelled, provided the company follows the approved liability reduction plan. Together, these changes are intended to prevent permit holders from avoiding or delaying restoration of inactive sites only to later become insolvent and to incentivize permit holders to proactively restore inactive sites.

Moreover, Bill 15 proposes vesting the Commission with greater authority to act in emergency situations or with a public safety purpose, including the ability to enter on any land or body of water to affect what an official considers necessary in the circumstances. The current regime only allows for such mitigating action in the event of a spill. The Commission would also gain added cost-recovery and enforcement powers against permit holders.

Finally, Bill 15 proposes additional powers for the Commission to improve debt collection by allowing the Commission or Government to recover unpaid levies and other charges through an expedited court process.

B.C.'s Response to Redwater

The B.C. government's interest in introducing Bill 15 is likely a response to the recent decision by the Alberta Court of Appeal in *Orphan Well Association v Grant Thornton Limited (Redwater)*.⁴ *Redwater* confirmed that receivers and trustees in bankruptcy may disclaim uneconomic assets, including those subject to environmental reclamation obligations set out by provincial regulators such as orphan wells.

Redwater's outcome, currently on appeal to the Supreme Court of Canada, raises the prospect of greater financial exposure for B.C.'s environmental regulatory regime. Moreover, it risks placing an additional burden on solvent producers, and possibly taxpayers, to bear the cost of environmental obligations to abandon and reclaim disclaimed and orphaned wells and facilities.

Bill 15 attempts to address the province's concerns by introducing a regime to insulate its taxpayers from the implications of the *Redwater* decision through shifting costs back on producers, while simultaneously giving the Commission additional tools to curtail the number of orphan sites.

Concluding Thoughts

Bill 15 is likely to increase front-end financial obligations on B.C. operators and permit holders. Moreover, unlike the current production-based tax regime, the liability regime will be more uncertain

⁴ *Orphan Well Association v Grant Thornton Limited*, [2017 ABCA 124](#).

for permit holders, with levy obligations likely to fluctuate from year to year with changing OSRF targets set by the Commission. Finally, the Commission's extended ability to issue, suspend, cancel or amend a permit carries the potential to influence oil and gas transactions and corporate governance decisions. While these proposed amendments should give B.C. the ability to better fund its orphan well reclamation program, they add additional and uncertain costs to producers, who will continue to maintain responsibility for the economic burden associated with orphan sites.

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